

405 KAR 7:035. Exemption for coal extraction incidental to the extraction of other minerals.

RELATES TO: KRS 350.010, 350.028, 350.060, 350.151, 350.465, 30 C.F.R. Parts 702, 730-733, 735, 917, 30 U.S.C. 1253, 1255, 1291

STATUTORY AUTHORITY: KRS Chapter 13A, 350.020, 350.028, 350.465, 30 C.F.R. Parts 702, 730-733, 735, 917, 30 U.S.C. 1253, 1255, 1291

NECESSITY, FUNCTION, AND CONFORMITY: KRS Chapter 350 in pertinent part requires the cabinet to promulgate administrative regulations pertaining to surface coal mining and reclamation operations. KRS Chapter 350 also recognizes exemptions from regulation for certain types of operations. This administrative regulation recognizes a regulatory exemption for operations in which coal is extracted incidental to the extraction of other minerals. The administrative regulation sets forth application requirements and procedures for obtaining approval of these exemptions, requirements for public notice and disclosure of information concerning the exemption, standards for cabinet approval of the exemption, conditions for maintaining the exemption, rights of entry and inspection to the site for which the exemption was granted, and enforcement procedures and reporting requirements applicable to the exemption.

Section 1. Measurement and Reporting Period. (1) The beginning of the cumulative measurement period shall be:

(a) For mining areas where extraction of coal or other minerals commenced on or after August 3, 1977, the date extraction of coal or other minerals commenced at that mining area; and

(b) For mining areas where coal or other minerals were extracted prior to August 3, 1977, the operator shall select and consistently use one (1) of the following, subject to cabinet approval: the date extraction of coal or other minerals commenced at that mining area or August 3, 1977.

(2) The end of the cumulative measurement period and the end of the twelve (12) month period (for annual reporting purposes pursuant to Section 9 of this administrative regulation) shall be:

(a) For mining areas where extraction of coal or other minerals commenced on or after the effective date of this administrative regulation, the last day of the calendar quarter during which coal extraction commenced, and each anniversary of that day thereafter; and

(b) For mining areas where coal or other minerals were extracted prior to the effective date of this administrative regulation, December 31, 1992 and each anniversary of that day thereafter.

Section 2. Application Requirements and Procedures. (1)(a) Any person who plans to commence or continue coal extraction after the effective date of this administrative regulation, in reliance on the incidental mining exemption, shall file a complete application for exemption with the cabinet for each mining area.

(b) Following the effective date of this administrative regulation, a person shall not commence coal extraction based upon the exemption until the cabinet approves the application for exemption, except as provided in subsection (5)(c) of this section.

(2) Existing operations. Any person who has commenced coal extraction at a mining area, prior to the effective date of this administrative regulation, in reliance upon the incidental mining exemption, may continue mining operations for sixty (60) days after the effective date of this administrative regulation. Coal extraction shall not continue after this sixty (60) day period unless that person files an administratively complete application for exemption with the cabinet. If an administratively complete application is filed within sixty (60) days, the person may continue extracting coal in reliance on the exemption beyond the sixty (60) day period until the cabinet makes an administrative decision on the application.

(3) Additional information. The cabinet shall notify the applicant if the application for exemption is incomplete and may at any time require submittal of additional information.

(4) Public comment period. Following publication of the newspaper notice required by Section 3(9) of this administrative regulation, the cabinet shall provide a period of no less than thirty (30) days during which any person having an interest that is or may be adversely affected by a decision on the application may submit written comments or objections.

(5) Exemption determination.

(a) No later than ninety (90) days after filing of an administratively complete application, the cabinet shall make a written determination whether, and under what conditions, the persons claiming the exemption are exempt under this administrative regulation, and shall notify the applicant and persons submitting comments on the application of the determination and the basis for the determination.

(b) The determination of exemption shall be based upon information contained in the application and any other information available to the cabinet at that time.

(c) If the cabinet fails to provide an applicant with the determination specified in paragraph (a) of this subsection, an applicant who has not begun may commence coal extraction pending a determination on the application unless the cabinet issues an interim finding, together with reasons therefore, that the applicant shall not begin coal extraction.

(6) Administrative review.

(a) In accordance with the procedures established under 400 KAR 1:110, Section 9, within thirty (30) days of the notification of a determination under subsection (5) of this section, any person adversely affected by the determination may request a formal hearing to review the determination.

(b) A request for formal hearing filed under 400 KAR 1:110, Section 9 shall not suspend the effect of a determination under subsection (5) of this section.

Section 3. Contents of Application for Exemption. An application for exemption shall include at a minimum:

(1) The name and address of the applicant;

(2) A list of the minerals sought to be extracted;

(3) Estimates of annual production of coal and the other minerals within each mining area over the anticipated life of the mining operation;

(4) Estimated annual revenues to be derived from bona fide sales of coal and other minerals to be extracted within the mining area;

(5) If coal or the other minerals are to be used rather than sold, estimated annual fair market values at the time of projected use of the coal and other minerals to be extracted from the mining area;

(6) The basis for all annual production, revenue, and fair market value estimates;

(7) A description, including county, city if within municipal boundaries, and boundaries of the land, of sufficient certainty that the mining areas can be located and distinguished from other mining areas;

(8) An estimate to the nearest acre of the number of acres that will compose the mining area over the anticipated life of the mining operation;

(9) Evidence of publication, in the newspaper of largest bona fide circulation (according to the definition in KRS 424.110 to 424.120) in the county of the mining area, of a public notice that an application for exemption has been filed with the cabinet. The public notice shall identify the persons claiming the exemption and shall contain a description of the proposed operation and its locality sufficient for interested persons to identify the operation;

(10) Representative stratigraphic cross-section(s) based on test borings or other information identifying and showing:

(a) The relative position, approximate thickness, and density of the coal and each other mineral to be extracted for commercial use or sale; and

(b) The relative position and thickness of any material, not classified as other minerals, that will

also be extracted during the conduct of mining activities;

(11) A map of appropriate scale that clearly identifies the mining area;

(12) A general description of mining and mineral processing activities for the mining area;

(13) A summary of sale commitments and agreements, if any, that the applicant has received for future delivery of other minerals to be extracted from the mining area, or a description of potential markets for the other minerals;

(14) If the other minerals are to be commercially used by the applicant, a description specifying the use;

(15) For operations having extracted coal or other minerals prior to filing an application for exemption, in addition to the information required above, the following information:

(a) Any relevant documents the operator has received from the cabinet documenting the operation's exemption from the requirements of the SMCRA, KRS Chapter 350, and 405 KAR;

(b) The cumulative production of the coal and other minerals from the mining area; and

(c) Estimated tonnages of stockpiled coal and other minerals; and

(16) Any other information pertinent to the qualification of the operation as exempt.

Section 4. Public Availability of Information. (1) Except as provided in subsection (2) of this section, all information submitted to the cabinet under this administrative regulation shall be made immediately available for public inspection and copying at the department's regional office with jurisdiction over coal mining in the locality of the subject exempt operation, until at least three (3) years after expiration of the period during which the subject mining area is active.

(2) The cabinet may keep information submitted to the cabinet under this administrative regulation confidential if the person submitting it requests in writing, at the time of submission, that it be kept confidential and if the information concerns trade secrets or is privileged commercial or financial information of the persons intending to conduct operations under this administrative regulation.

(3) Information requested to be held as confidential under subsection (2) of this section shall not be made publicly available until after notice and opportunity to be heard is afforded persons both seeking and opposing disclosure of the information.

Section 5. Requirements for Exemption. (1) Activities are exempt from the requirements of SMCRA, KRS Chapter 350, and 405 KAR (excluding this administrative regulation) if all of the following are satisfied:

(a) The cumulative production of coal extracted from the mining area does not exceed sixteen and two-thirds (16 2/3) percent of the total cumulative production of coal and other minerals removed for purposes of bona fide sale or reasonable commercial use, determined annually.

(b) The coal is produced from one (1) or more seams lying above the deepest stratum from which other minerals are extracted for purposes of bona fide sale or reasonable commercial use, or from a seam immediately below this deepest stratum.

(c) The cumulative revenue derived from the coal extracted from the mining area does not exceed fifty (50) percent of the total cumulative revenue derived from the coal and other minerals removed for purposes of bona fide sale or reasonable commercial use, determined annually. If the coal extracted or the minerals removed are used by the operator or transferred to a related entity for use instead of being sold in a bona fide sale, then the fair market value of the coal or other minerals shall be calculated at the time of use or transfer and shall be considered rather than revenue.

(2) Persons that are seeking or have obtained an exemption under this administrative regulation from the requirements of SMCRA, KRS Chapter 350, and 405 KAR Chapters 7 through 24 (excluding this administrative regulation) shall comply with the following:

(a) Each other mineral upon which an exemption under this administrative regulation is based shall be a commercially valuable mineral for which a market exists or which is mined in bona fide an-

ticipation that a market will exist for the mineral in the reasonably foreseeable future, not to exceed twelve (12) months from the end of the current period for which cumulative production is calculated. A legally binding agreement for the future sale of other minerals shall be sufficient to demonstrate this standard.

(b) If either coal or other minerals are transferred or sold by the operator to a related entity for its use or sale, the transaction shall be made for legitimate business purposes.

Section 6. Conditions of Exemption and Right of Inspection and Entry. (1) A person conducting activities covered by this administrative regulation shall:

(a) Maintain on-site, or at other locations available to authorized representatives of the cabinet and the Secretary of the U.S. Department of the Interior, information necessary to verify the exemption including, but not limited to, commercial use and sales information, extraction tonnages, and a copy of the exemption application and exemption approved by the cabinet;

(b) Notify the cabinet upon completion of the mining operations or permanent cessation of all coal extraction activities; and

(c) Conduct operations in accordance with the approved application or, if authorized to extract coal under Section 2(2) or (5)(c) of this administrative regulation prior to submittal or approval of an exemption application, in accordance with the standards of this administrative regulation.

(2) Authorized representatives of the cabinet and the Secretary of the U.S. Department of the Interior shall have the right to conduct inspections of operations claiming exemption under this administrative regulation.

(3) Each authorized representative of the cabinet and the Secretary of the U.S. Department of the Interior conducting an inspection under this administrative regulation shall:

(a) Have a right of entry to, upon, and through any mining and reclamation operations without advance notice or a search warrant, upon presentation of appropriate credentials;

(b) At reasonable times and without delay, have access to and copy any records relevant to the exemption; and

(c) Have a right to gather physical and photographic evidence to document conditions, practices, or violations at a site.

(4) No search warrant shall be required with respect to any activity under subsections (2) and (3) of this section, except that a search warrant may be required for entry into a building.

Section 7. Stockpiling of Minerals. (1) Coal. Coal extracted and stockpiled may be excluded from the calculation of cumulative production until the time of its sale, transfer to a related entity, or use:

(a) Up to an amount equaling a twelve (12) month supply of the coal required for future sale, transfer, or use as calculated based upon the average annual sales, transfer, and use from the mining area over the two (2) preceding years; or

(b) For a mining area where coal has been extracted for a period of less than two (2) years, up to an amount that would represent a twelve (12) month supply of the coal required for future sales, transfer, or use as calculated based on the average amount of coal sold, transferred, or used each month.

(2) Other minerals.

(a) The cabinet shall disallow all or part of an operator's tonnages of stockpiled other minerals for purposes of meeting the requirements of this administrative regulation if the operator fails to maintain adequate and verifiable records of the mining area of origin or the disposition of stockpiles, or if the disposition of the stockpiles indicates the lack of commercial use or market for the minerals.

(b) The cabinet shall only allow an operator to utilize tonnages of stockpiled other minerals for purposes of meeting the requirements of this administrative regulation if:

1. The stockpiling is necessary to meet market conditions or is consistent with generally accepted

industry practices; and

2. Except as provided in paragraph (c) of this subsection, the stockpiled other minerals do not exceed a twelve (12) month supply of the mineral required for future sales as approved by the cabinet on the basis of the exemption application.

(c) The cabinet may allow an operator to utilize tonnages of stockpiled other minerals beyond the twelve (12) month limit established in paragraph (b) of this subsection if the operator can demonstrate to the cabinet's satisfaction that the additional tonnage is required to meet future business obligations of the operator, such as may be demonstrated by a legally binding agreement for future delivery of the minerals.

(d) The cabinet may periodically revise the other mineral stockpile tonnage limits in accordance with the criteria established by paragraphs (b) and (c) of this subsection based on additional information available to the cabinet.

Section 8. Revocation and Enforcement. (1) Cabinet responsibility. The cabinet shall conduct an annual compliance review of the mining area, utilizing:

- (a) The annual report submitted pursuant to Section 9 of this administrative regulation;
- (b) An on-site inspection; and
- (c) Any other information available to the cabinet.

(2) If the cabinet has reason to believe that a specific mining area was not exempt under the provisions of this administrative regulation at the end of the previous reporting period, is not exempt, or will be unable to satisfy the exemption criteria at the end of the current reporting period, the cabinet shall notify the operator that the exemption may be revoked and the reason(s) therefor. The exemption shall be revoked unless the operator demonstrates to the cabinet within thirty (30) days that the mining area in question did meet and will continue to meet the criteria for exemption.

(3)(a) If the cabinet finds that an operator has not demonstrated that activities conducted in the mining area qualify for the exemption, the cabinet shall revoke the exemption and immediately notify the operator and interveners. If a decision is made not to revoke an exemption, the cabinet shall immediately notify the operator and interveners.

(b) In accordance with the procedures established under 400 KAR 1:110, Section 9, within thirty (30) days of the notification of a decision whether to revoke an exemption, any person adversely affected by the decision may request a formal hearing to review the decision.

(c) A request for formal hearing filed under 400 KAR 1:110, Section 9 shall not suspend the effect of a decision whether to revoke an exemption.

(4) Direct enforcement.

(a) An operator mining in accordance with the terms of an approved exemption shall not be cited for violations of KRS Chapter 350 or 405 KAR Chapters 7 through 24 that occurred prior to the revocation of the exemption.

(b) An operator who does not conduct activities in accordance with the terms of an approved exemption and knows or ought to know that the activities are not in accordance with the approved exemption shall be subject to direct enforcement action for violations of KRS Chapter 350 and 405 KAR Chapters 7 through 24 that occur during the period of the activities.

(c) Upon revocation of an exemption or denial of an exemption application, an operator shall stop conducting surface coal mining operations until a permit is obtained, and shall comply with the reclamation standards of KRS Chapter 350 and 405 KAR Chapters 7 through 24 with regard to conditions, areas, and activities existing at the time of revocation or denial.

Section 9. Reporting Requirements. (1)(a) Following approval by the cabinet of an exemption for a mining area, the person receiving the exemption shall, for each mining area, file a written report annually with the cabinet containing the information specified in subsection (2) of this section.

(b) The report shall be filed no later than thirty (30) days after the end of the twelve (12) month period as determined in accordance with Section 1(2) of this administrative regulation.

(c) The information in the report shall cover:

1. Annual production of coal and other minerals and annual revenue derived from coal and other minerals during the preceding twelve (12) month period; and

2. The cumulative production of coal and other minerals and the cumulative revenue derived from coal and other minerals.

(2) For each period and mining area covered by the report, the report shall specify:

(a) The number of tons of extracted coal sold in bona fide sales and the total revenue derived from these sales;

(b) The number of tons of coal extracted and used or transferred by the operator or related entity and the estimated total fair market value of this coal;

(c) The number of tons of coal stockpiled;

(d) The number of tons of other commercially valuable minerals extracted and sold in bona fide sales and total revenue derived from these sales;

(e) The number of tons of other commercially valuable minerals extracted and used or transferred by the operator or related entity and the estimated total fair market value of these minerals; and

(f) The number of tons of other commercially valuable minerals removed and stockpiled by the operator. (18 Ky.R. 560; 1069; 1865; eff. 11-26-1991; TAm eff. 5-4-2018; Crt eff. 7-3-2018.)